IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 9, 2008 Session

ELIZABETH ALICE CHAMPLIN v. METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, ET AL.

Appeal from the Circuit Court for Davidson County
No. 04C-2260 Barbara Haynes, Judge

No. M2007-02158-COA-R3-CV - Filed April 20, 2009

Cyclist who was injured when she fell after hitting a rise in a sidewalk appeals grant of summary judgment to the Metropolitan Government of Nashville and Davidson County ("Metro") in proceeding under the Tennessee Governmental Tort Liability Act. In opposition to Metro's motion for summary judgment, cyclist filed a sidewalk inventory that had been prepared as part of Metro's effort to determine if all sidewalks in the county complied with the Americans with Disabilities Act to show that Metro had notice of the defective condition of the sidewalk. Trial court held that the inventory did not constitute notice of defective, unsafe or dangerous condition to Metro. Finding the holding of the trial court to be correct, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Stephan D. Karr, Nashville, Tennessee, for the appellant, Elizabeth Alice Champlin.

Sue B. Cain, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville and Davidson County, Tennessee

OPINION

On the morning of August 10, 2003, Elizabeth Champlin was riding her bicycle on a sidewalk in the City of Lakewood in Davidson County. As she approached the area of 3606 Old Hickory Boulevard, she allegedly hit a broken rise in the sidewalk that caused her to fly over her handlebars. As a result of the accident, she suffered a broken jaw and a slight concussion.

Ms. Champlin filed suit against the Metropolitan Government of Nashville and Davidson County ("Metro") to recover for her injuries; an amended complaint was subsequently filed naming the State of Tennessee and the City of Lakewood as additional defendants. All three defendants filed

summary judgment motions on various grounds. In its motion, Metro asserted that it was immune from suit for failure to make an inspection or making an inadequate or negligent inspection pursuant to Tenn. Code Ann. § 29-20-205(4); that it had no notice of the defective, unsafe, or dangerous condition as required by Tenn Code Ann. § 29-20-203(b); and that it was not the entity responsible for the maintenance of the sidewalk.

The trial court granted all the defendants' motions for summary judgment. In the order granting Metro's motion, the court found as follows:

> 1. Metropolitan Government of Nashville, Davidson County, Tennessee began a project known as the Metropolitan Nashville Davidson County Strategic Plan for Sidewalks and Bikeways.
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> 2. In 2001, RPM Transportation Consultants was hired to, among other things, inventory all sidewalks in Davidson County, Tennessee to determine if the sidewalks complied with the standards established by the Americans with Disabilities Act.
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> 3. On or about March 11, 2002, RPM Transportation Consultants inventoried the sidewalk located on Old Hickory Boulevard between Anthony Avenue and Iris Avenue. At that location, there were determined to be 19 horizontal cracks, 4 vertical cracks, and 20 feet of linear damage.
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> 4. On or about May 24, 2002, a letter from Rebecca Brooks of RPM Transportation Consultants to Jim Snyder of Metropolitan Nashville Department of Public Works enclosed a disc containing the completed sidewalk inventory data base for the Nashville Davidson County Strategic Plan for Sidewalks and Bikeways.
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> 5. On August 10, 2003, Plaintiff was injured while riding her bicycle at 3606 Old Hickory Boulevard in Lakewood, Davidson County, Tennessee.
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> 6. The Court specifically finds that the sidewalk inventory which was provided to Metropolitan Government of Nashville, Davidson County, Tennessee on May 24, 2002 did not constitute notice to Metro Government of a defective, unsafe or dangerous condition at 3606 Old Hickory Boulevard in Lakewood, Davidson County, Tennessee.
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> Therefore, Plaintiffs have not satisfied the notice requirement of the Governmental Tort Liability Act T.C.A. § 29-20-203 and the Metropolitan Government of Nashville, Davidson County, Tennessee's Motion for Summary Judgment is hereby granted.

Ms. Champlin appeals the grant of summary judgment to Metro, contending that "the evidence is overwhelming that Metro had actual knowledge and at the least constructive knowledge of the condition of the sidewalk."[1] She does not contend that summary judgment was improper because there were genuine issues of material fact on the notice issue; rather, she contends that the

[1] The trial court did not address the other grounds of Metro's motion and they are not at issue in this appeal.

evidence of record establishes, as a matter of law, that Metro had notice of the defective condition of the sidewalk. Metro does not contest the factual findings of the trial court.

I. STANDARD OF REVIEW

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. V. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). We make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977).

Summary judgment is appropriate where a party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stoval v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003). Moreover, it is proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, it is not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that the party is entitled to judgment as a matter of law. *Godfrey v. Ruis*, 90 S.W.3d 692, 695 (Tenn. 2002). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or show that the non-moving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008).

II. DISCUSSION

Tenn. Code Ann. § 29-20-203 removes governmental immunity for injuries caused by the defective, unsafe or dangerous condition of a sidewalk if the governmental entity has actual or constructive notice of the condition; notice must be "alleged and proved" by the plaintiff. In *Kirby v. Macon County,* 892 S.W.2d 403 (Tenn. 1994), the Tennessee Supreme Court discussed the notice requirement of the Act and distinguished "actual" and "constructive" notice as follows:

> 'Actual notice' has been defined by our Court as 'knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts.' . . . 'Constructive notice' is 'information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence and his situation was such as to cast upon him the duty of inquiring into it.'

892 S.W.2d at 409 (internal citations omitted).

Notice to Metro of the defective condition is an essential element of Ms. Champlin's claim and, in filing the motion for summary judgment, Metro had the burden to affirmatively negate this

element or show that Ms. Champlin could not prove that Metro had notice of the condition at trial. *See Hannan v. Alltel Publ'g Co.*, *supra*; *see also McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd*, 847 S.W.2d at 215 n.5. In support of its motion, Metro filed, *inter alia,* the affidavit of James Snyder, Capital Manager for the Metro Department of Public Works. Mr. Snyder stated that, based on a review of the Department of Public Works' records, there were no requests for repair, complaints or calls regarding the sidewalk where Ms. Champlin fell prior to her accident. Metro contended that this showed that Metro had no actual notice of the condition of the sidewalk or evidence that the condition had existed for such time as to constitute constructive notice. The affidavit of Mr. Snyder negated an essential element of Ms. Champlin's claim, *viz.*, that Metro had actual or constructive notice of the defective condition, thereby shifting the burden to her to either come forward with evidence establishing material factual disputes that were over-looked or ignored by Metro or to produce additional evidence establishing the existence of a genuine issue for trial. *See McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215.

In response to Metro's motion, Ms. Champlin filed, among other things, excerpts from the depositions of Mr. Snyder and of Mr. Robert Murphy, principal of RPM Transportation Consultants ("RPM"), along with the inventory of sidewalks performed in early 2002 by RPM. It is this inventory, Ms. Champlin contends, that constituted notice to Metro of the dangerous condition of the sidewalk sufficient to comply with Tenn. Code Ann. § 29-20-203(b). Ms. Chamblin contends that, since the inventory catalogued the condition of all 752 miles of sidewalks in Davison County, Metro had "either actual or constructive knowledge of the sidewalk at 3606 Old Hickory Boulevard." The question before us is whether the inventory, standing alone, constitutes either actual or constructive notice of the specific defective condition that Ms. Champlin contends caused her accident.

According to the deposition testimony of Mr. Snyder, the inventory was prepared as part of the development of the Metro Nashville, Davidson County Strategic Plan for Sidewalks and Bikeways ("the Plan") and was performed by RPM Transportation Consultants. Mr. Murphy testified that the purpose of performing the inventory was to identify sidewalks that did not meet Americans with Disability Act standards and guidelines[2] and that, after completing the inventory RPM developed an index for prioritizing sidewalk improvements; the index was based on such factors as proximity to schools, density of development and proximity to land uses that would generate walking traffic.

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[2] With respect to the ADA guidelines, Mr. Murphy provided the following testimony:

> Q. What is your understanding generally speaking, the ADA guidelines with respect to sidewalks and their state of repair.
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> A. Well, there's a number of parts to that. I guess, first of all, there are width requirements. There are requirements for maximum vertical displacement, as well as horizontal displacement for cracks in sidewalks; and there's also obstruction issues; and, I mean, those really relate more to the width requirements than anything. There's also slope . . . issues.

The portions of the Plan filed in opposition to the summary judgment motion confirm that the Plan's purpose was "to develop a thorough sidewalk database that could be used to determine the magnitude of ADA problems for sidewalks and ramps, to develop cost estimates for bringing the sidewalks and ramps into ADA compliance, and for planning future sidewalks that would connect to or extend existing sidewalks." After discussing the methodology used in performing the inventory, the Plan reported its results. With specific respect to problems with sidewalks, the Plan reported the following:

> Sidewalk problems include obstructions, cracks, damaged segments, missing segments, and excessive cross slope. . . . [O]nly 0.5% of sidewalk blocks, or 36 blocks, are free of problems. Approximately 25.1% of sidewalk blocks, or 1,798 blocks, have between one and five problems. Approximately 30.3% of sidewalk blocks, or 2,176 blocks, have between six and ten problems. The remaining 3,160 blocks, or 44.1% of sidewalk blocks, have more than ten problems.
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> One of the problems identified by the sidewalk inventory is damaged sidewalk. A damaged sidewalk segment is considered to be a portion of a sidewalk that is broken or that has significant cracking. As identified by the inventory, 7.3% of sidewalks, or 55 miles, of existing public sidewalks are damaged. . . .
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> The sidewalk inventory also identified cracks as a problem with existing public sidewalks. As inventoried, existing public sidewalks contain 30,251 vertical cracks and 18,107 horizontal cracks. The actual occurrence of cracks varies among sidewalk blocks. However, based on 752 miles of sidewalks, the occurrence of cracks is equivalent to approximately 40 vertical cracks per mile of sidewalk and approximately 24 horizontal cracks per mile of sidewalk.

In *Hawks v. City of Westmoreland,* 960 S.W.2d 10 (Tenn. 1997), a proceeding under Tenn. Code Ann. § 29-20-204,[3] the Tennessee Supreme Court found that, as a result of the city's failure to exercise due diligence in its initial inspection of a water improvement project, the city had constructive notice that underground valves which provided water to fire hydrants were closed, thereby rendering the hydrants inoperable,. *Id.* at 15,17. In so ruling, the court held:

> [A] governmental entity will be charged with constructive knowledge of a fact or information, if the fact or information could have been discovered by reasonable diligence and the governmental entity had a duty to exercise reasonable diligence to inquire into the matter.

Id. at 15. Significantly, the court found that the hydrants were installed as a part of a water system improvement project; that, during the inspection of the system, leaks were detected in three hydrants

[3] Tenn. Code Ann. § 29-20-204 removes governmental immunity for injuries caused "by the dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement owned and controlled by [the] entity." The notice requirement is the same as in Tenn. Code Ann. § 29-20-203.

in the area at issue; that the underground valves were closed to repair the leaks, but that only one of the hydrants was repaired; and that, as a consequence, potentially two valves were left closed. *Id*.

In *Bradford v. City of Clarksville,* 885 S.W.2d 78 (Tenn. Ct. App. 1994), the trial court's finding that the City of Clarksville had both actual and constructive notice of a defective gas or water meter manhole cover on a sidewalk upon which the plaintiff fell was upheld in light of proof that the cover had been broken for a number of years and that the city Gas and Water Department read the meter once a month. *Id*. at 82.

In *Kirby, supra.*, the Tennessee Supreme Court upheld a trial court's finding that the plaintiffs failed to prove actual or constructive notice to the county of a defective condition, specifically, missing wheel guards on a bridge, that caused plaintiffs' car to slide off the bridge, *Kirby*, 892 S.W.2d 410. The plaintiffs in *Kirby* had introduced state bridge inspection reports for a number of years prior to the accident in question, with each report citing the bridge to be in "poor" or "critical" condition and recommending installation of approved guardrails; the report also noted that the wooden wheel guards used on the bridge were "loose," "in poor condition" and had areas of heavy decay. *Id*. at 405. The county road superintendent testified that the county disregarded the state's recommendations to install guardrails; that the wheel guard on the bridge in question had been repaired three weeks prior to the accident; and that no one had notified him that any portion of the wheel guards was missing since the repair. *Id.* Upon this proof, the court held that it was "clear" that the county officials and the road superintendent did not have actual notice of the missing wheel guards. The court held further that there were no prior accidents on the bridge and no proof of constructive notice presented.

These cases each recognize that the Tort Liability Act requires notice of the actual defective or dangerous condition alleged to have caused the loss. While the inventory relied upon by Ms. Champlin shows that sidewalks throughout the county did not comply with the ADA, it does not detail that any sidewalk constituted a "defective, unsafe or dangerous condition." Likewise, with respect to the particular sidewalk where Ms. Champlin suffered her fall, the inventory only identifies the number of horizontal and vertical cracks and extent of linear damage; it does not provide notice of a dangerous, defective or unsafe condition. The inventory is insufficient to constitute actual or constructive notice to Metro of the dangerous condition of the sidewalk where Ms. Champlin fell and there is no other proof in the record from which to conclude that Metro had the requisite notice. *See Zamek v. O'Donnell,* 2007 WL 98481 (Tenn. Ct. App. Jan. 16, 2007) (holding that county was not put on notice of "defective, unsafe or dangerous" condition of intersection in the absence of proof of prior complaints regarding the intersection or prior accidents at the location).

III. CONCLUSION

For the foregoing reasons, the judgment of the circuit court is affirmed.

Costs of this cause are taxed to Elizabeth Champlin, for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE